



**Ondijo v Ochola & 4 others (Environment & Land Case
52 of 2021) [2022] KEELC 72 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 72 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 52 OF 2021
GMA ONGONDO, J
MAY 10, 2022
FORMERLY MIGORI ELC CASE NO. E008 OF 2021**

BETWEEN

ROSELINE ORIMBA ONDIJO PLAINTIFF

AND

MAURICE OTIENO OCHOLA 1ST DEFENDANT

ROBERT OGOLA OCHOLA 2ND DEFENDANT

WILKISTER ADHIAMBO OTIENO 3RD DEFENDANT

COUNTY LAND REGISTRAR HOMA-BAY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. On March 5, 2021, the 1st, 2nd and 3rd defendants through learned counsel, Andrew Ombwayo filed a preliminary objection dated March 3, 2021 based on the grounds *infra*;
 - a) That the issue as to whether the plaintiff or her husband has purchased the property known as LR No West/kasipul/kodera/karabach/8xx (the suit property herein) had been considered and determined in a judgement/ruling dated November 12, 2020 by the High Court sitting in Homa-Bay in Homa-Bay High Court Succession Cause No 83 of 2016 and is therefore *res judicata* under section 7 Civil Procedure Act (Cap 21).
 - b) That the plaintiffs claim for purchasing the subject property is ambiguous and is unsustainable under section 3(1) Law of Contract Act Cap 23 as it seeks to have the 1st, 2nd and 3rd defendants to answer for alleged debt, default or miscarriage of another person without formal memorandum



or note, duly executed by them being presented by the plaintiff, and without the existence of such memorandum or note.

- c) That the question of sale/purchase of the property by the plaintiff is equally unsustainable through this suit and is inconsistent with section 3(3)Law of Contract Act Cap 23 in the absence of a formal sale agreement between parties, duly witnessed.
2. It is important to note that the plaintiff through the firm of Kirui and Company Advocates generated the present suit by an originating summons dated January 30, 2021 and lodged in court on February 17, 2021. He is seeking the following orders;
- a) That declaration that the plaintiff is entitled to recover the whole of the suit property measuring approximately 1.3 Ha under the Limitation of Actions Act, Chapter 22 of Laws of Kenya, on grounds that the plaintiff herein has been peacefully and continuously been in active use and possession of the aforesaid land parcel well over 30 years, without any interference at all since 1987 to date.
 - b) That there be an order that the plaintiff Roseline Orimba Ondijo, be registered as the proprietor of the suit property measuring approximately 1.3 Ha, currently registered in the names of Wilkister Adhiambo Otieno by way of fraud.
 - c) That there be an order directing 4th defendant to register the suit property measuring approximately 1.3 Ha, into the names of Roseline Orimba Ondijo.
 - d) That there be an order restraining the 1st, 2nd and 3rd defendants by themselves, their agents, servants and/or employees from interfering, encroaching, or dealing with the plaintiff's suit property in any manner whatsoever and/or howsoever that is inconsistent with the plaintiff's rights thereon.
 - e) That costs of this originating summons be borne by the defendants.
 - f) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
3. The originating summons is anchored on the plaintiff's supporting affidavit of 10 paragraphs and the annexed documents marked as "ROO 1" to "ROO 4" and grounds (a) to (h) set out on the face of the same. Briefly, the plaintiff claims to have acquired title of the whole suit property by adverse possession.
4. The preliminary objection was provoked by the originating summons.
5. Initially, the instant suit was lodged at Migori Environment and Land court. The same was transferred to this court, upon its establishment, with effect from October 18, 2021.
6. The preliminary objection was canvassed by way of written submissions further to this court's orders and directions made on November 22, 2021.
7. On January 20, 2022, the 1st, 2nd and 3rd defendants' counsel filed submissions dated January 13, 2022. Counsel relied on section 3(1) of the Law of Contract Act (Cap 23) and the succession cause (*infra*) hence, sought the court to strike the suit with costs to the defendants.
8. By the plaintiff's submissions dated February 2, 2022, counsel urged the court to dismiss the preliminary objection. Counsel relied on section 7 of the Civil Procedure Act (cap 21) and the case of Celina Muthoni Kithinji-versus Safiya Binti Swaleh and others (2018) eKLR.



9. Notably, Homa Bay High Court Succession Cause number 83 of 2016 (The succession cause) prominently featured in the present matter. Therefore, this court called for and perused the entire original file in the said cause to confirm its proceedings and outcome.
10. I have duly considered the entire preliminary objection, the originating summons and the parties' respective submissions. So, is the preliminary sustainable?
11. The preliminary objection raised herein is on points of law: See the case of *Mukisa Biscuits Manufacturing Company Ltd-vrs- West End Distributors* (1969) EA 696.
12. It is trite law that a preliminary objection is a threshold question best raised at the inception of a case. That thus, the same calls for prompt attention as held in *Kakuta Maimai Hamisi –vrs- Peris Pesi Tubiko*(2013) eKLR.
13. As regards *res judicata*, I am guided by section 7 of the *Civil Procedure Act* chapter 21 Laws of Kenya. I bear in mind all the elements of *res judicata* doctrine thereunder.
14. In the *Black's Law Dictionary 10th Edition* at page 1504, the term “*Res judicata*” means an issue that has been definitively settled by judicial decision. The three essential elements of the doctrine are;
 - a) An earlier decision on the issue
 - b) A final judgment on the merits, and
 - c) The involvement of the same parties or parties in privy with the original parties.
15. The certificate of confirmation of grant dated August 16, 2017, does not capture the plaintiff as heir of the estate of the deceased. So, the claim of purchase of the suit property by the plaintiff's late husband from brother of the deceased, pleads for proof at the hearing of the suit.
16. In the succession cause, the plaintiff's application by way of summons for revocation of grant dated March 20, 2018, was dismissed on November 12, 2020. However, the court observed;

.....she may have a case of action against the estate of deceased based on an interest in land. In that case here remedy lies in the Environment and Land court and not this court. This is more so considering that she alleged that she has been in occupation of the land for over thirty (30) years. This is suitable fodder for a claim of interest in the Land by way of adverse possession. (Emphasis supplied).
17. Plainly, issues of interest in land including adverse possession and or not succession are raised herein. Moreover, the elements set out in paragraph 14 herein above are not satisfied in preliminary objection. Therefore, *res judicata* does not apply in this suit.
18. In *Yaxley vs Gotts and another* (2000) Ch 162, it was noted that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract save on the basis of a constructive trust or proprietary estoppel; see also *Macharia Mwangi Maina and 87 others-vs – Davidson Mwangi Kagiri* (2014) eKLR.
19. It is therefore, this court's finding that issues arise in this suit which is not *res judicata* for merit determination. The same call for fair hearing under Article 50 (1) of the *Constitution* of Kenya, 2010.
20. *A fortiori*, the 1st, 2nd and 3rd defendants' preliminary dated March 3, 2021 and filed in court on March 5, 2021, be and is hereby dismissed with costs in the cause.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 10TH DAY OF MAY 2022.

G .M.A ONG'ONDO



JUDGE

Present;

Ms. Opar holding brief for Mr. Ombwayo, learned counsel for the 1st, 2nd and 3rd defendants
Okello, Court Assistant.

G .M.A ONG'ONDO

JUDGE

